Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan For Our Future	)	GN Docket No. 09-51
	)	
High-Cost Universal Service Support	)	WC Docket 05-337
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

To: The Commission

OPPOSITION OF THE NAVAJO NATION TELECOMMUNICATIONS REGULATORY COMMISSION TO PETITION FOR RECONSIDERATION

NAVAJO NATION TELECOMMUNCATION REGULATORY COMMISSION

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Summary

The *CAF Order* grants Native Nations a true "seat at the table" to guide the deployment of high speed broadband in Indian Country, as well as recognizing the sovereign rights of Tribes over their internal affairs. The *CAF Order* adopts certain Tribal Engagement Provisions to recognize the special needs of Native Nations, as well as recognizing the unique trust relationship and requirements for government-to-government consultation required under the Constitution and the Telecommunications Act. The Petitioners, however, wish to yank that chair away from the table before anyone even sits in it by asking the Commission to reverse itself and remove the Tribal Engagement Provisions of the *CAF Order*. They argue that such provisions violate their First Amendment rights, are contrary to law, and are arbitrary and capricious as unsupported by the record.

More than just Petitioners' commercial speech rights are implicated by their request. Rather, the FCC must balance the limited First Amendment rights in commercial speech against the rights afforded Tribes under the Indian Commerce Clause of the Constitution. In situations where the Federal government is providing an economic benefit or subsidy, such as is the case with USF/CAF, it may impose conditions on the receipt of such support that may burden speech. The FCC requiring carriers to discuss their marketing plans with Tribes does nothing more than ensure that Federal funds are being spent as Congress intended.

The Tribal Engagement Provisions are consistent both with the Telecommunications Act and general Indian Law. Petitioners' analysis of both is dated and rooted in a mindset reminiscent of centuries gone by. It ignores fundamental rights of Tribes to exclude outsiders from their borders, and the sovereign right to regulate non-Tribal activities on Tribal lands.

The Tribal Engagement Provisions are fully supported by the record, which itself relies heavily on the work performed by the FCC on the National Broadband Plan. Petitioners ignore the record and discount to zero the work of Tribal groups to highlight the depth and breadth of the digital divide, instead citing as proof of full deployment eight cases representing barely one percent of the Federally-recognized Tribes in the United States, including the Mohegans, a tribe of barely 1500 members located on 500 acres in the heart of densely populated Connecticut. NNTRC is fully aware that some Tribes do have 100 percent access to broadband. But to say that the Mohegans are the same as the Navajo, who occupy more than 3 ***million*** acres spread across three states, with 200,000 members, hides the nature of how most Native Americans live today.

Finally, Petitioners argue that the Tribal Engagement Provisions will be overly burdensome, before ONAP has even had a chance, on a government-to-government basis, to work with Tribes to establish procedures. NNTRC is committed to working with the FCC to craft rules which will not be burdensome on carriers, but will allow them to reuse much of the same data and filings they are already required to collect and submit.

The Commission should reject Petitioners' attempt to continue to reap the billions of dollars in Federal subsidies provided under USF/CAF, without doing anything to meet the needs of Native peoples. The Commission should heed the words of former Commissioner Copps: "The sad history here, as we all know, is many promises made, many promises broken. We need to turn the page, and I think we are beginning to do that now." The page will only be turned if the FCC maintains its commitment to fulfilling its trust relationship with Tribes and affirms the Tribal Engagement Provisions in the *CAF Order*.

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To: The Commission

OPPOSITION OF THE NAVAJO NATION TELECOMMUNICATIONS REGULATORY COMMISSION TO PETITION FOR RECONSIDERATION

The Navajo Nation Telecommunications Regulatory Commission ("NNTRC"), through undersigned counsel, respectfully submits this Opposition to the Petition For Reconsideration ("the Petition") filed by the Rural Incumbent Local Exchange Carriers Serving Tribal Lands ("Petitioners"),[2] filed electronically on December 29, 2011, and posted in ECFS on December

[2] According to the Second Erratum filed by the Petitioners on January 4, 2012, the Petitioners include the following 23 LECs: 3 Rivers Telephone Cooperative, Inc.; Big Bend Telephone Company, Inc.; Butler-Bremer Communications; Clear Lake Independent Telephone Company; Communications 1 Network, Inc.; Custer Telephone Cooperative, Inc.; Emery Telecom; Gold Star Communications, LLC; MAC Wireless, LLC; Manti Telephone Company; Midstate Communications, Inc.; Northeast Louisiana

30, 2012, in response to the FCC's *Connect America Fund Order ("CAF Order").*[3] In support of this Opposition, NNTRC submits:

I. BACKGROUND

The *CAF Order* grants Native Nations, such as the Navajo Nation, a true "seat at the table," in helping guide the deployment of high speed broadband in Indian Country, as well as recognizing the sovereign rights of Tribes over their internal affairs.[4] Commissioner Copps, in his Statement accompanying the release of the *CAF Order* said it best:

> We are also moving toward a fuller appreciation of what tribal sovereignty means and of the need to accord tribes the fuller and more active role they must have in order to ensure the best and most appropriate deployment and adoption strategies for their areas and populations. I feel encouraged that we are at long last positioning ourselves to make progress by working more closely and creatively together. The sad history here, as we all know, is many promises made, many promises broken. We need to turn the page, and I think we are beginning to do that now.[5]

Included in the *CAF Order* are provisions requiring carriers seeking government support from USF or CAF for service to Tribal Lands to engage Tribal governments, including, at a minimum, to hold discussions that include: (1) a needs assessment and deployment planning with a focus on Tribal community anchor institutions; (2) feasibility and sustainability planning;

Telephone Company, Inc.; NNTC Wireless, Inc.; Public Service Telephone Company; Penasco Valley Telephone Cooperative; Inc.; Sagebrush Cellular, Inc.; Smithville Telecom, LLC; Strata Networks; Walnut Telephone Company, Inc.; Wapsi Wireless, LLC; West Texas Rural Telephone Cooperative, Inc.; Wiggins Telephone Association; and WUE, Inc.

[3] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Reform – Mobility Fund; Report and Order and Further Notice of Proposed Rulemaking,* WC Dockets No. 10-90, 07-135, 05-337, 03-109; CC Dockets No. 01-92, 96-45; GN Docket No. 09-51; WT Docket No. 10-208, released November 18, 2011 ("*CAF Order*").

[4] *See, e.g., CAF Order*, ¶ 484 ("We also adopt Tribal engagement requirements and preferences that reflect our unique relationship with Tribes. We believe that these measures should provide meaningful support to expand service to unserved areas in a way that acknowledges the unique characteristics of Tribal lands and reflects and respects Tribal sovereignty.").

[5] *Id.*, Statement of Commissioner Michael J. Copps.

(3) marketing services in a culturally sensitive manner; (4) rights of way processes, land use permitting, facilities siting, environmental and cultural preservation review processes; and (5) compliance with Tribal business and licensing requirements.[6]

The Petitioners, however, wish to yank that chair away from the table before anyone even sits in it by asking the Commission to reverse itself and remove the Tribal Engagement Provisions of the *CAF Order*. They argue that such provisions violate their First Amendment rights, are contrary to law, and are arbitrary and capricious as unsupported by the record. As demonstrated herein, each of these arguments falls far short of the mark; the FCC's actions in this regard are consistent with sound constitutional principles and are fully supported by the record. More fundamentally, the Petition evidences yet more of the same treatment Native Americans have suffered for hundreds of years, stripping the indigenous nations that lie within the boundaries of the United States the protections afforded to them under the Constitution and the many Treaties between Tribes and the Federal government. In short, the Petitioners seek to reap the benefit of their incumbent status, and the economic support provided by USF and CAF, but want no part in engaging Tribal governments in determining the needs of Native peoples, or, critically, in planning the buildout of telecommunications infrastructure on tribal lands and marketing in a manner that ensures that the services they are supposed to provide are actually meeting the needs of Native peoples and institutions.

II. THE TRIBAL ENGAGEMENT PROVISIONS ARE FULLY SUPPORTED BY THE CONSTITUTION OF THE UNITED STATES

The Petitions argue that their First Amendment rights are infringed by requiring them to hold discussions with Tribes they serve with support from USF/CAF as to whether they are

[6] *CAF Order*, ¶ 637 (hereinafter, "the Tribal Engagement Provisions").

"marketing services in a culturally sensitive manner."[7] The Petitioners argue that under the *Central Hudson* test,[8] how Petitioners choose to market their services is protected commercial speech, and the FCC has overstepped constitutional bounds by requiring carriers to discuss their marketing materials with Tribal governments.[9]

Petitioners' First Amendment argue first ignores the fact that there is another constitutional right here – the rights and duties apportioned between the United States, the individual states, and Tribes. Under the Constitution, Congress was granted the power to "regulate Commerce . . . with the Indian Tribes," (the "Indian Commerce Clause")[10] while the President was empowered to make treaties, necessarily including Indian treaties, with the consent of the Senate.[11] The Supreme Court early on had to deal with the jurisdictional relationship between the Federal government, the states and Tribes. First in *Cherokee Nation v. Georgia*,[12] Chief Justice Marshall concluded that Tribes (at least those residing on reservations) in many respects were akin to states. The very next term, in *Worcester v. Georgia*,[13] Justice Marshall again addressed the status of Tribes with respect to states and state laws. There, several missionaries convicted of entering the Cherokee Nation without first obtaining a license from the state governor appealed their convictions. The Supreme Court overturned the convictions, concluding that the course of relations between the Federal government and the Cherokees provided ample evidence that the Federal government "manifestly consider[s] the several Indian

[7] *Petition*, p. 11, quoting *CAF Order*, ¶ 637.

[8] *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

[9] *Petition*, pp. 11-12.

[10] U.S. Const. Art. I, § 8, cl. 3.

[11] U.S. Const. Art. II, § 2, cl. 2.

[12] 30 U.S. (5 Pet.) 1 (1831).

[13] 31 U.S. (6 Pet.) 515 (1832).

nations as distinct political communities, having territorial boundaries, within which their authority is exclusive."[14]

> The FCC has long recognized the constitutional sovereign rights of Tribes.
>
> It is well-established that federally recognized Tribes have inherent sovereignty and self-determination, and exercise jurisdictional powers over their members and territory with the obligations to 'maintain peace and good order, improve their condition, establish school systems, and aid their people...' within their jurisdictions. In 2000, the Commission formally recognized this sovereignty in its Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes.

In the Matter of Improving Communications Services for Native Nations (Notice of Inquiry), FCC 11-30, CG Docket No. 11-41, ¶ 4 (released March 4, 2011), *citing Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd 4078, 4080 (2000) (*Tribal Policy Statement*).

> The federal government has a trust relationship with federally recognized Tribes, and this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Tribes. In this regard, the federal government has a longstanding policy of promoting Tribal self-sufficiency and economic development, as embodied in various federal statutes. As an independent agency of the federal government, we recognize our own general trust relationship with, and responsibility to, federally recognized Tribes. The Commission also recognizes 'the rights of Indian Tribal governments to set their own communications priorities and goals for the welfare of their membership.' We believe any inquiry into potential solutions to communications deployment challenges on Tribal lands will benefit from the inclusion of Hawaiian Home Lands, as, much like Tribal lands, these lands have a trust status for Native Hawaiians, both as homesteads and for non-Native economic development activities that benefit the Native Hawaiian community. Thus, any approach to deploying communications services, removing barriers to entry, and increasing broadband availability and adoption must recognize Tribal sovereignty, autonomy, and independence, the unique status and needs of Native Nations and Native communities, the importance of consultation with Native Nation government and community leaders, and the critical role of Native anchor institutions.

Id. at ¶ 5 (footnotes omitted). Thus the First Amendment free speech rights of Petitioners must

[14] *Id.* at 557.

be balanced against the Indian Commerce Clause of the constitution.

Further, Petitioners' reliance on *Central Hudson* is also misplaced. *Central Hudson* involved an outright ban on electric utility advertising to promote the use of electricity. Where a Federal benefit is involved, however, the government has much greater latitude in conditioning the grant of such benefits, even if such conditions might impact First Amendment rights. In *Rust v. Sullivan*,[15] the Supreme Court upheld a "gag order" that prohibited family planning clinics that accept federal funds from engaging in abortion counseling or referrals. The Court found that "the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for purposes for which they were authorized."[16] Similarly, in *National Endowment for the Arts v. Finley*,[17] the Supreme Court upheld the constitutionality of a federal statute (20 U.S.C. § 954(d)(1)) requiring the NEA, in awarding grants, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."

In seeking the substantial government benefit of receipt of USF funds, Congress has required since 1996 that carriers first seek designation as an Eligible Telecommunications Carrier (ETC),[18] and agree to conduct themselves in a certain manner. Under Section 214(e)(1)(B), ETC's must agree to "advertise the availability of such services and the charges therefor using media of general distribution."[19] Thus, prior to enactment of the *CAF Order*, carriers wishing to take advantage of the Federal subsidy offered under USF had to agree to engage in certain speech. In place for 15 years, this existing impingement on commercial speech has never been successfully challenged. Indeed, such an advertising requirement is merely an

[15] 500 U.S. 173 (1991).

[16] *Id.* at 196.

[17] 524 U.S. 569 (1998).

[18] 47 U.S.C. § 214(e).

example where the government is "insisting that public funds be spent for purposes for which they were authorized."[20] By now requiring in the *CAF Order* that ETC's that receive the benefit of USF/CAF money for service to Tribal Lands engage Tribal governments in a discussion of whether their advertising actually reaches Tribal members is a further instance of ensuring that the government benefit be spent in the manner in which Congress authorized. As the Supreme Court stated in *NEA v. Finley*:

> Finally, although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities.

524 U.S. at 585. If Petitioners do not wish to comply with the minimal burdens Congress has placed on ETC's, they are free to give up their ETC status and not take advantage of USF/CAF support.

III. THE TRIBAL ENGAGEMENT PROVISIONS ARE CONSISTENT WITH BOTH THE TELECOMMUNICATIONS ACT AND INDIAN LAW

The Petitioners also argue that the Tribal Engagement Provisions violate the Telecommunications Act and Indian Law more generally by requiring them to comply with Tribal business and licensing requirements.[21] The Petitioners' analysis is flawed, however, and refuses to recognize, as Commissioner Copps so clearly stated, that the FCC is "moving toward a fuller appreciation of what tribal sovereignty means and of the need to accord tribes the fuller and more active role they must have in order to ensure the best and most appropriate deployment

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[19] 47 U.S.C. § 214(e)(1)(B).

[20] *Rust v. Sullivan*, 500 U.S. at 196.

[21] *Petition*, pp. 8-11, *citing CAF Order*, ¶ 637.

and adoption strategies for their areas and populations."[22] Petitioners' mindset (and legal arguments) are stuck in the last century. Their reliance on *Western Wireless*[23] as the summit of Indian Telecommunications Law ignores the last decade of FCC and court jurisprudence. As the *CAF Order* points out, over the past ten years the FCC has come to recognize how deep the "Digital Divide" is, and how much work is required to bridge that divide.[24] Further, in the *CAF Order*, as well as the other proceedings cited therein, the FCC has recognized both the unique status and sovereign rights of Tribes, as well as the trust obligation that the Federal government has.[25] Finally the FCC has fully recognized the extent of government-to-government relationship with Tribes under Federal law.

> Tribes are inherently sovereign governments that enjoy a special relationship with the U.S. predicated on the principle of government-to-government interaction. This government-to-government relationship warrants a tailored approach that takes into consideration the unique characteristics of Tribal lands in extending the benefits of broadband to everyone. Any approach to increasing broadband availability and adoption should recognize Tribal sovereignty, autonomy and independence, the importance of consultation with Tribal leaders, the critical role of Tribal anchor institutions, and the community oriented nature of demand aggregation on Tribal lands.[26]

This approach is consistent with the current Administration's declaration in this area,[27]

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[22] *Supra*, n. 5.

[23] *In the matter of Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota; Federal-State Joint Board on Universal Service*, 16 FCC Rcd 18145 (FCC 2001).

[24] *CAF Order*, ¶ 636, *citing Improving Communications Services for Native Nations, CG Docket No. 11-41, Notice of Inquiry*, 26 FCC Rcd 2672, 2673 (2011) (*Native Nations NOI*); *Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum Over Tribal Lands, WT Docket No. 11-40, Notice of Proposed Rulemaking*, 26 FCC Rcd 2623, 2624-25 (2011) (*Spectrum Over Tribal Lands NPRM*); *Connecting America: The National Broadband Plan*, prepared by staff of the Federal Communications Commission, March 10, 2010 (*National Broadband Plan*) at 152, Box 8-4.

[25] *Id. See also. CAF Order*, ¶¶ 484, 636, 1219.

[26] *National Broadband Plan*, p. 146 (Box 8-3).

[27] *See* http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president.

> History has shown that failure to include the voices of tribal officials in formulating policy

and the Federal mandate to consult with Indian tribes on a government-to-government basis under Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*.[28] "The Commission, in accordance with the federal government's trust responsibility, and to the extent practicable, will consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources."[29]

The Petitioners conveniently ignore this precedent, as well as the FCC's most recent ruling regarding the rights of Tribes to participate in Commission proceedings impacting the provision of telecommunications services on Tribal Lands. In *Standing Rock Telecommunications, Inc. Petition for Designation as an Eligible Telecommunications Carrier (Reconsideration),* FCC 11-102 (released June 22, 2010), the Commission recognized the rights of Tribal authority over telecommunications carriers serving their lands.

> We also find that this conclusion aligns with the nature of Tribal sovereignty. Congress usually intends that its "statutes . . . be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." This canon is "rooted in the unique trust relationship between the United States and the Indians." The Commission has recognized its "fiduciary duty to conduct [itself] in matters affecting Indian tribes in a manner that protects the interest of the tribes" and its corresponding obligation to interpret "federal rules and policies . . . in a manner that comports with tribal sovereignty and the federal policy of empowering tribal independence." Recognizing that all residents of the reservation reside within a sovereign community better respects the inherent sovereignty of Tribal governments than a rigid policy that defines the requisite

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> affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between federal officials and tribal officials has greatly improved federal policy toward Indian tribes. Consultation is a critical component to creating a sound and productive federal-tribal relationship. The federal government must take the lead in coordinating among the various agencies with responsibilities vis-à-vis tribes, and establishing lines of communication with those tribes so that broadband access is available to every person in the United States.

Id. at p. 184.

[28] Executive Order No. 13175, 65 Fed. Reg. 67249 (November 9, 2000).

[29] *Tribal Policy Statement,* 16 FCC Rcd at 4081.

> minimum geographic area as the population of a wire center regardless of its conformance with political and jurisdictional boundaries.

Id. at ¶ 15 (footnotes omitted).

Petitioners reliance on *Montana v. U.S.* is wholly misplaced.[30] First, the Tribal Engagement Provisions (including the requirement that carriers comply with Tribal business and licensing requirements) are not requirements placed on carriers by Tribes. They are requirements placed on Commission licensees by the FCC, and are consistent with Congressional intent. Further, *Montana v. U.S.* involved the issue of whether a Tribe could regulate the activities on non-Tribal members on non-Tribal Lands. Courts since *Montana* have questioned whether the so-called "*Montana* Exceptions" are applicable to situations involving the activities of non-Tribal members on Tribal Lands.[31]

Moreover, courts since *Montana*, including the Supreme Court, have recognized an inherent right of tribes to exclude non-Indians from Tribal lands, or to condition their entry on Tribal Lands,[32] absent a clear and unambiguous statement by Congress abrogating such right.[33] The right to exclude non-members also incidentally includes the right to regulate non-member activities on Tribal Lands.[34] In *Water Wheel*, for example, the Colorado River Indian Tribes had entered into a long-term lease with a non-Indian corporation to operate a marina, convenience store, bar, trailer and camping spaces on the shore of the Colorado River, on land held in trust for the Tribe. After the lease expired the lessee

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[30] *Petition*, pp. 9-10, *citing Montana v. U.S.* 450 U.S. 544 (1981).

[31] *See Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 8021, 8039-40 (9th Cir. 2011).

[32] *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983) ("A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is ... well established."); *see also Water Wheel*, 642 F.3d at 808.

[33] *See, e.g.*, United States v. Lara, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004); *see also* Santa Clara Pueblo, 436 U.S. 49, 58, 60, 98 S.Ct. 1670 (1978).

[34] *See South Dakota v. Bourland*, 508 U.S. 679, 688-89, 113 S.Ct. 2309, 2316-17 (1993) (explaining that the incidental right of the tribe to regulate non-member activities on Tribal Lands was extinguished when Congress took the lands at issue from the tribe and gave them a "public use").

refused to vacate the premises or negotiate a new lease. The Ninth Circuit concluded:

> We hold that under the circumstances presented here, where there are no sufficient competing state interests at play, *Nevada v. Hicks*, 533 U.S. 353, 359-60 (2001), the tribe has regulatory jurisdiction through its inherent authority to exclude, independent from the power recognized in *Montana v. United States*, 450 U.S. 544 (1981). Because regulatory jurisdiction exists, we also consider whether adjudicative jurisdiction exists. In light of Supreme Court precedent recognizing tribes' inherent civil authority over non-Indian conduct on tribal land and congressional interest in promoting tribal self-government, we conclude that it does.

Id. at 8026. The Court then went on to state that with the inherent sovereign right to exclude non-members from Tribal lands also comes the right to regulate their activities on those lands, again independent of the other two prongs of *Montana*.

> We must therefore conclude that the [Tribe]'s right to exclude non-Indians from tribal land includes the power to regulate them unless Congress has said otherwise, or unless the Supreme Court has recognized that such power conflicts with federal interests promoting tribal self government. *Iowa Mut. Ins. Co.*, 480 U.S. at 18 ("Tribal authority over activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." (internal citations omitted)); *Merrion*, 455 U.S. at 146 (noting the "established views that Indian tribes retain those fundamental attributes of sovereignty . . . which have not been divested by Congress or by necessary implication of the tribe's dependent status"); *Santa Clara Pueblo*, 436 U.S. at 56 ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

Id. at 8039-40. Importantly, nowhere in the Communications Act of 1934 or the Telecommunications Act of 1996 has Congress "clearly and unambiguously" abrogated the right of tribes to regulate the provision of telecommunications services on Tribal Lands through tribal business and licensing requirements.

Finally, even if *Montana* analysis is required, courts have recognized that the entry onto Tribal Lands and the provision of service to Tribal members is a "consensual relationship" triggering the rights

of Tribes to regulate, to the extent allowed under Federal and state law, the activities of those non-Tribal members.[35] In *Big Horn County Elec. Co-Op v. Adams*, 53 F.Supp.2d 1047 (D. MT 1999), *aff'd in part, reversed in part*, 219 F.3d 944 (9th Cir. 2000), for example, the local electrical utility co-op challenged a 3 percent tax against the value of the facilities on the reservation, and a companion regulation that prohibited the co-op from passing that tax down to subscribers on the reservation. The Montana Federal District Court analyzed the activity as follows:

> *Montana* defines consensual relationships with the tribe or its members as 'commercial dealings, contracts, leases, or other arrangements.' Big Horn voluntarily undertook to set up an electricity distribution network, in part on the Crow Indian Reservation. Big Horn delivers electricity to the Crow Tribe and its members and it charges a fee for that delivery. Big Horn's activities constitute a 'consensual relationship' as defined in *Montana*. The existence of a consensual relationship therefore allows the Tribe to use its retained inherent sovereign power and exercise civil jurisdiction and authority over the 'activities' or 'conduct' of Big Horn Country Electric Co-op, even on non-Indian fee land.

53 F.Supp.2d at 1051-52. This analysis was confirmed on appeal by the Ninth Circuit.

> The district court correctly concluded that Big Horn formed a consensual relationship with the Tribe because Big Horn entered into contracts with tribal members for the provision of electrical services. While the agreements creating Big Horn's rights of way were insufficient to create a consensual relationship with the Tribe, see *Red Wolf*, 196 F.3d at 1064, Big Horn's voluntary provision of electrical services on the Reservation did create a consensual relationship.

219 F.3d at 951.[36] In the same vein, a telephone company that enters Tribal lands and voluntarily provides services to Tribal members (as opposed to merely running wires through rights-of-way that traverse Tribal Lands), have equally entered into a "consensual relationship"

[35] In order to provide services on Navajo Tribal Lands, telecommunication providers are required to expressly agree to the full territorial, regulatory and adjudicatory jurisdiction of the tribe in order to get the Navajo tribe's consent to and/or approval of telecommunication leases, permits, and rights-of-way.

[36] The Appeals Court in *Big Horn* ultimately overturned the three percent tax on the electric co-op based on the finding that the tax was levied on the value of the assets of the co-op and not on the activities of the co-op. Whereas the Tribe had jurisdiction over the activities of the co-op, it did not have jurisdiction over the assets, which were located on rights-of-way granted by the Federal government. 219 F. at 951.

with the Tribe.[37]

The Tribal Engagement Provisions contained within the *CAF Order* are therefore consistent both with the Telecommunications Act of 1996, and general Indian Law. Requiring carriers who take advantage of the government benefits afforded under USF/CAF to comply with Tribal business and licensing requirements are not regulations promulgated by Tribes, but rather regulations promulgated by the FCC pursuant to its delegated authority under the Telecommunication Act and Section 214 to implement USF. The Tribal Engagement Provisions strike a proper balance between the rights of the Federal government, state governments, and Tribal rights (both aboriginal as well as those recognized by Treaty) and telephone carriers seeking the benefits afforded under USF/CAF.

IV. THE TRIBAL ENGAGEMENT PROVISIONS ARE FULLY SUPPORTED BY THE RECORD

The Petitioners argue that the *CAF Order* is arbitrary and capricious because there is insufficient record evidence to support the conclusion that the Tribal Engagement Provisions are "vitally important to the successful deployment and provision of service."[38] Again, Petitioners turn a blind eye to a decade of proceedings at the FCC, and totally ignore the comments filed in this proceeding by NNTRC and others Tribal groups.

First and foremost, the *CAF Order* cites to, and relies upon the huge effort undertaken by the FCC to develop the *National Broadband Plan.* The *CAF Order* relies on the work done in

[37] *But see, Reservation Telephone Co-Operative v. Henry*, 278 F.Supp.2d 1015 (D. ND 2003), in which a Federal District Court, in applying North Dakota law and a North Dakota state Supreme Court case, concluding that a cooperative providing utility services, including telephone service, to customers on Tribal Lands did not rise to the level of entering into a "consensual relationship" because of the "unique relationship between a cooperative and its customer." NNTRC submits that this case is limited to North Dakota, and that the analysis in *Big Horn* is both more persuasive, and the precedent applicable to the Navajo Nation, coming out of the Ninth Circuit, the jurisdictional district in which the majority of the Navajo lies.

the *NBP* to support its conclusions as to the Tribal Engagement Provisions. The *NBP* is replete with evidence of the unique status and needs of Tribes, as well as the need for Tribal involvement, and government-to-government consultation.[39] For Petitioners to say that the

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[38] *Petition*, p. 3, *citing CAF Order*, ¶ 636.

[39] *See, e.g.*, *NBP*, p. 23 ("Those living on Tribal lands have very low adoption rates, mainly due to a lack of available infrastructure. What little data exist on broadband deployment in Tribal lands suggest that fewer than 10% of residents on Tribal lands have terrestrial broadband available."); pp. 76 & 97 ("The FCC should take into account the unique spectrum needs of U.S. Tribal communities when implementing the recommendations in this chapter."); p. 97 ("Facilitating access to the FCC's spectrum dashboard described in Recommendation 5.1 will be critical to helping Tribal communities use spectrum or identify non-Tribal parties that hold licenses to serve Tribal lands. To enhance Tribal access to such information, future iterations of the spectrum dashboard should include information identifying spectrum allocated and assigned in Tribal lands. If the FCC conducts spectrum utilization studies in the future, those studies should identify Tribal lands as distinct entities."); p. 136 ("Throughout the USF reform process, the FCC should solicit input from Tribal governments on USF matters that impact Tribal lands."); p. 146 ("In recognition of Tribal sovereignty, the FCC should solicit input from Tribal governments on any proposed changes to USF that would impact Tribal lands. Tribal governments should play an integral role in the process for designating carriers who may receive support to serve Tribal lands. The ETC designation process should require consultation with the relevant Tribal government after a carrier files an ETC application to serve a Tribal land. It should also require that an ETC file a plan with both the FCC (or state, in those cases where a carrier is seeking ETC designation from a state) and the Tribe on proposed plans to serve the area."); p. 146, Box 8-3 ("The United States currently recognizes 564 American Indian Tribes and Alaska Native Villages (Tribes).89 Tribes are inherently sovereign governments that enjoy a special relationship with the U.S. predicated on the principle of government-to-government interaction. This government-to-government relationship warrants a tailored approach that takes into consideration the unique characteristics of Tribal lands in extending the benefits of broadband to everyone. Any approach to increasing broadband availability and adoption should recognize Tribal sovereignty, autonomy and independence, the importance of consultation with Tribal leaders, the critical role of Tribal anchor institutions, and the community oriented nature of demand aggregation on Tribal lands."); *Id.* ("Available data, which are sparse, suggest that less than 10% of residents on Tribal lands have broadband available. The Government Accountability Office noted in 2006 that "the rate of Internet subscribership [on Tribal lands] is unknown because no federal survey has been designed to capture this information for Tribal lands." But, as the FCC has previously observed, "[b]y virtually any measure, communities on Tribal lands have historically had less access to telecommunications services than any other segment of the population." Many Tribal communities face significant obstacles to the deployment of broadband infrastructure, including high buildout costs, limited financial resources that deter investment by commercial providers and a shortage of technically trained members who can undertake deployment and adoption planning. Current funding programs administered by NTIA and RUS do not specifically target funding for projects on Tribal lands and are insufficient to address all of these challenges. Tribes need substantially greater financial support than is presently available to them, and accelerating Tribal broadband deployment will require increased funding."); p. 184 ("Developing and executing a plan to ensure that Tribal lands have broadband access and that Tribal communities utilize broadband services requires regular and meaningful consultation with Tribes on a government-to-government basis, as well as coordination across multiple federal departments and agencies."); *id.* ("Tribal governments must interact with multiple federal agencies and departments on a wide range of programs. Because broadband is a critical input to the achievement of goals in many areas, including

record does not support the enactment of the Tribal Engagement Provision is to profess that Petitioners have either not read, or simply ignored, the *NBP*.

Further, as an outgrowth of the *NBP*, the FCC has opened several proceedings and received hundreds of comments related to the special telecommunications needs of Tribes.[40] NNTRC has filed comments in most, if not all of these proceedings, all of which support the efforts of the FCC to recognize Tribal sovereignty and foster a more active role for Tribes in the regulatory process. Other organizations, such as Native Public Media (NPM), the National Congress of American Indians (NCAI), and the National Tribal Telecommunications Association (NTTA) have done the same. To argue that these "handful" of comments should be disregarded does a gross disservice to these public interest groups that have worked tirelessly to get Tribal telecommunications needs on the FCC's "radar screen."[41]

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education, health care, public safety and economic development, the federal government should establish a Federal-Tribal Broadband Initiative to coordinate both internally and directly with Tribal governments on broadband related policies, programs and initiatives. The initiative will include elected Tribal leaders or their appointees and officials from relevant federal departments and agencies. The FCC should create an FCC-Tribal Broadband Task Force consisting of senior FCC staff and elected Tribal leaders or their appointees to carry out its commitment to promoting government- to-government relations. The task force will assist in developing and executing an FCC consultation policy, ensure that Tribal concerns are considered in all proceedings related to broadband and develop additional recommendations for promoting broadband deployment and adoption on Tribal lands.")

[40] *See, e.g., Improving Communications Services for Native Nations, Notice of Inquiry*, CG Docket No. 11-41, released March 4, 2011 (48 pleadings filed as of 11/20/11); *Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands, Notice of Proposed Rulemaking*, WT Docket No. 11-40, released March 3, 2011 (27 pleadings filed as of October 28, 2011); Policies to Promote Rural Radio Service and to Streamline Allotment Assignment Procedures, Second Report and Order, MB Docket No. 09-52 (released March 3, 2011); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of Telecommunications Act of 1996 (Eighty Broadband Progress Notice of Inquiry)*, GN Docket 11-121, released August 5, 2011 (36 filings as of October 21, 2011); *Telecommunications Carriers Eligible to Receive Universal Service Support*, WC-09-197 (ETC designation proceedings).

[41] For example, there are more than a dozen citations in the *NBP* directly to the filings or publications of Native Public Media and NCAI.

NNTRC vigorously objects to the Petitioners' argument that NNTRC's comments somehow are "favorable" to Petitioners' arguments or position.[42] Nothing could be further from the truth, and for Petitioners to make that claim borders on sophistry. NNTRC has consistently been on record in this proceeding, and in others, that it needs that "seat at the table" in order to be able to impact the provision of telecommunications services to Navajos. Contrary to Petitioners' claim that NNTRC has stated that wireline carrier engagement with NNTRC is not necessary, the full NNTRC met with FCC ONAP representatives on October 22, 2011. During that meeting, NNTRC Commissioners specifically called out the need "to be able to better regulate carriers who enter tribal lands and build facilities there, sometimes without receiving direct tribal authority."[43] That need is not limited to wireless carriers, but extends to all carriers who deploy infrastructure and engage in business relationships with the Navajo people, both individually, and with the Navajo Tribe as a whole.

Finally, the Petitioners argue that there is no support for the conclusion that Tribes lack access to broadband.[44] They first claim that the National Broadband Map shows much of Indian Country served.[45] As the *CAF Order* points out, however, there is substantial question as to whether the National Broadband Map is accurate.[46] This is buttressed by NNTRC filings in this and other proceedings pointing out that one study done comparing the National Broadband Map to the IDInsight database shows that the National Broadband Map grossly overstates the

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[42] *Petition,* pp. 4-5.

[43] *See NNTRC Ex Parte* filing of October 24, 2011 in this docket. That *Ex Parte* filing also detailed other discussions that day, including thanking the FCC for the opportunity to participate in FCC proceedings on a government-to-government consultative basis based on FCC's Federal trust relationship with the Tribe.

[44] *Petition,* pp. 5-7.

[45] Id., pp. 6-7.

[46] *CAF Order,* ¶ 335, n. 231.

availability of broadband on the Navajo Nation.[47] To this, Petitioners waive the back of their proverbial hand by stating: "While there are some issues with the NBM data, for example, the NBM states that the broadband record set is not complete for some reservations, the data shows that the Commission's claims about the lack of broadband access are based on old data that the Commission continues to recycle from one proceeding to the next."[48] Instead, Petitioners list eight (of 565) Tribes which they claim either by firsthand knowledge or by reference to the National Broadband Map, show near 100% broadband availability. Based on this, Petitioners claim that no special provisions for Tribes are necessary.

NNTRC has never stated that ***no*** Tribe has 100% access to broadband. But to conclude based on a chosen sample of the eight best cases (1.2% of Tribes) that no special need exists in Indian Country is to ignore the other 99 percent, many of whom live far away on the other side of the Digital Divide.[49] NNTRC has consistently advocated for better mapping to find out what services are available. But technical availability alone is not enough. A service may be technically available, yet not actually marketed to Tribal members. That is what the FCC is trying to remedy with its Tribal Engagement Provisions.

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[47] *NNTRC Ex Parte* filing, pp. 2-3. *See also* Reply Comments of NNTRC in Docket 11-40 (referring to the IDInsight study). Under the NTIA's State Broadband Data and Development Grant Program, the Broadband Data Improvement Act (BDIA) "mandates that each State may have only a single eligible entity" to collect and manage the mapping data. 74 Fed.Reg. 32545 (July 8, 2009). Tribes were thus excluded from the mapping process, and in a case such as Navajo, where the Navajo reservation lies in three separate states, the program, as implemented, has led to significant inaccuracies related to actual broadband deployment and availability in Indian Country.

[48] *Petition*, p. 7.

[49] It is indeed telling that the Petitioners cite to the case of the Mohegan Tribe as evidence to demonstrate that Native Americans are fully served by broadband. The Mohegan Tribe, with its 1500 members, received Federal recognition only in 1994, and occupies barely 500 acres in the fourth most densely populated state (Connecticut). Compare that to the 3.3 ***million*** acres of the Navajo Nation (6,600 times the size of the Mohegan reservation), and its 200,000-plus residents, all of whom reside in states ranking well below the national average for population density.

V. THE TRIBAL ENGAGEMENT PROVISIONS ARE NOT OVERLY BURDENSOME

Finally, Petitioners argue that the Tribal Engagement Provisions are overly burdensome.[50] Yet the actual parameters of the Tribal Engagement Provisions have not even been specified. The *CAF Order* delegates to its Office of Native Affairs and Policy (ONAP) the duty of crafting such engagement rules.[51] Apparently Petitioners believe that ***any*** engagement with Tribes is burdensome, and not worth the effort. In Petitioners' collective minds, apparently, engaging with customers isn't within their business model. And therein lies one of the fundamental reasons the Digital Divide has occurred, and is widening and deepening. Carriers such as Petitioners don't see any business benefit from engaging with their Native American customers, yet will fight for the right to collect huge subsidies from USF/CAF to deploy service onto Tribal Lands.

NNTRC is sympathetic to the argument that the Tribal Engagement Provisions could be burdensome in the event that a carrier provides service to only a small portion of a reservation.[52] NNTRC is considering this in the context of its current rulemaking proceeding (NNTRC-11-001 Application for Certificate of Convenience and Necessity), and is considering establishing an automatic waiver from engagement for carriers with a *de minimis* footprint on Navajo soil, and providing a waiver mechanism for other carriers who believe that engagement with NNTRC is overly burdensome. Further, it is moving toward adopting an engagement mechanism whereby carriers can utilize the same filings they've made with state regulatory authorities to comply with NNTRC filing requirements. NNTRC believes that Tribes, working with the FCC on a

[50] *Petition*, p. 13.

[51] *CAF Order*, ¶ 637 ("We envision that the Office of Native Affairs and Policy ("ONAP"), in coordination with the Wireline and Wireless Bureaus, would utilize their delegated authority to develop specific procedures regarding the Tribal engagement process as necessary").

government-to-government basis, can establish engagement procedures that will place minimal additional burden on carriers, and represent a cost burden that is an extremely small fraction of the amount received by such carriers in USF/CAF support for service provided to Tribal Lands.

VI. CONCLUSION

NNTRC applauds the FCC for its *CAF Order* Tribal Engagement Provisions and for finally establishing a seat at the regulatory table for Tribes. Such provisions are constitutional, consistent with statute and Indian Law precedent, and truly are "vitally important" to the successful deployment and continued provision of telecommunications services to Native Americans. NNTRC stands ready to cooperate with the FCC, state regulatory commissions, and carriers, in creating a framework that is minimally burdensome, and beneficial to the Navajo and to carriers themselves.

Respectfully submitted,

NAVAJO NATION TELECOMMUNCATIONS REGULATORY COMMISSION

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[52] *Petition*, p. 13.